No. 91-1291

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

ELIZABETH CARLISLE, *et al.*,

Petitioners,

vs.

BERNARD BRADSHAW, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Hampshire

RESPONDENTS' BRIEF IN OPPOSITION

EDWARD M. VAN DORN, JR.
Attorney for Respondents
27 Central Street
Woodsville, New Hampshire 03785
(603) 747-3506

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QUESTIONS PRESENTED FOR REVIEW

1. Is the Petition for Writ of Certiorari barred due to petitioners' failure to sufficiently raise and preserve federal questions in the court below?

2. Is the Petition for Writ of Certiorari barred because the New Hampshire Supreme Court decided the matter on adequate state grounds?

3. Is the Petition for Writ of Certiorari barred because the New Hampshire Supreme Court below reached a proper decision on the questions presented?

4. Should the Petition for Writ of Certiorari be rejected because of serious misstatements of fact contained therein?

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vs.

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On Petition for Writ of Certiorari to the Supreme Court of New Hampshire

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Town of Monroe, New Hampshire is located in the northwestern part of the State on the banks of the Connecticut River. According to the 1990 U.S. Census, the Town's population is 746. There are 304 single family homes, one small four (4) unit apartment house, one retail store with four (4) apartments, several

town buildings, several small businesses, two churches and two hydroelectric dams. In short, Monroe is a quintessential northern New England river town.

Part of the Town consists of a Village area which is not a separate entity. It is defined by the clustering of 47 single family homes, a small general store, a church and several Town buildings. Since 1932 the sewage needs of the Village and a small outlying section of Town have been served by connection to a storm drain system that feeds directly into the Connecticut River without treatment or processing of the effluent.

Since 1978, the Town has been on notice from state and federal authorities that the discharge was improper and had to be terminated. In 1989 the Town Meeting voted that the properties served by the sewer must install their own septic systems. Thereafter, most of the properties complied and installed individual septic systems. The cost of installation averaged around $2,500 per system. The cost of constructing and maintaining a municipal sewage treatment system, as demanded by the petitioners in the New Hampshire Superior Court and urged by them at the Town Meeting, would have exceeded one million dollars. This cost would have been paid by all Town taxpayers while it benefited only those few Village properties connected to the sewer.

Presently there are only nineteen remaining properties still connected to the sewer and the Town has given notice that the system will be disconnected by the spring of 1992. Twelve of the properties have applied for and received state approval of septic system designs, leaving seven properties that still resist installing individual septic systems.

Generally, petitioners' recitation of the procedural history of this matter is accurate, except, as set forth in detail below, petitioners failed to properly present and preserve federal questions

in the courts below and the matter was properly decided upon adequate state grounds.

REASONS FOR DENYING THE WRIT

I.

FEDERAL QUESTIONS WERE NOT SUFFICIENTLY PRESSED BELOW.

The petitioners contend that they raised the federal issues presented here in paragraphs 19 and 20 of their original Petition filed in the New Hampshire Superior Court (Petition for Writ of Certiorari, p. 9). However, review of these paragraphs in the context of the proceedings below makes clear that these vague federal constitutional and federal law references did not present or preserve the questions sufficiently for consideration by this Court.

First, it is important to consider that nowhere else in the state court proceedings do the petitioners raise or even refer to federal questions. Their entire presentation at both the trial and appellate levels is confined to principles of state law. Nowhere do they even cite a federal constitutional provision, federal statute, or federal judicial decision. This is true despite ample opportunity to raise federal questions.[1]

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1. Subsequent to the filing of the Superior Court Petition on July 19, 1988 (Petition for Writ of Certiorari, Appendix A), petitioners filed a Motion to Amend Petition on March 17, 1989 (Petition for Writ of Certiorari, Appendix B), Motion to Amend Petition on August 15, 1989, Motion for Clarification of Rights on September 27, 1989, Plaintiffs' Memorandum of Law on October 18, 1989, Requests for Findings of Fact and Rulings of Law on November 20, 1989, Request for Additional Findings of Fact on November 27, 1989, Notice of Cross Appeal with New Hampshire Supreme Court on July 11, 1990, and (Cont'd)

It is well settled that mere averment of federal constitutional violations are not enough to raise federal questions. *Herndon v. Georgia*, 295 U.S. 441, 79 L. Ed. 1530, 55 S. Ct. 794 (1934). Also, generic reference to constitutional claims are not sufficient to preserve a claim based on unidentified provisions of the Bill of Rights. *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 77, 100 L. Ed. 2d 62, 71, 108 S. Ct. 1645 (1988).

In this case the record clearly shows that the petitioners failed to present the federal constitutional questions to the court below in a manner sufficient to apprise that court of the nature and substance of the federal claims. *Webb v. Webb*, 451 U.S. 493, 101 S. Ct. 1889 (1981).

Moreover, in this case, where the petitioners seek to establish the general, far reaching principle that there is a federal constitutional property right in being connected to municipal sewer systems, it is important that the Court adhere to the customary limitations on its discretion and decline to accept this case where the record below was developed without regard for federal constitutional questions and the decision reached entirely on state grounds. *Bankers Life and Casualty Co. v. Crenshaw*, *supra* at

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(Cont'd)

New Hampshire Supreme Court Brief on March 7, 1991. Pertinent parts of these documents not otherwise presented in the Petition for Writ of Certiorari are reproduced in the Appendix to this brief to show that petitioners do not raise questions of federal law in the proceedings below. Motion to Amend Petition, August 15, 1989 (Resp. App. A, 1ra); Motion for Clarification of Rights (Resp. App. B, 5ra); Requests for Findings of Fact and Rulings of Law (Resp. App. C contains Rulings of Law, 8ra); Notice of Cross Appeal (Resp. App. D contains plaintiffs' description of case, legal authority upon which claim is based, and questions raised on appeal, 13ra); New Hampshire Supreme Court Brief (Resp. App. E contains Table of Authorities and Questions Presented for Review, 16ra); and Plaintiffs' Memorandum of Law (Resp. App. F contains Issues of Law, 19ra).

72, 73; *Illinois v. Gates*, 462 U.S. 213, 224, 76 L. Ed. 2d 527, 103 S. Ct. 2317 (1983); *Mishkin v. New York*, 383 U.S. at 512, 513, 16 L. Ed. 2d 56, 86 S. Ct. 958.

Finally, since the petitioners failed to present federal constitutional arguments to the New Hampshire Supreme Court the Petition should be rejected. At the trial level the federal claims vaguely referenced in the Superior Court Petition were dismissed by the trial court without argument or discussion (Petition for Writ of Certiorari, Appendix C, pp. 59-60). The petitioners failed to preserve these questions by appealing them to the New Hampshire Supreme Court.

For these reasons the Petition for Writ of Certiorari should be rejected.

II.

THIS MATTER WAS DECIDED UPON ADEQUATE STATE GROUNDS.

Although federal constitutional claims were obliquely referenced in the original petition filed in the Superior Court they were promptly abandoned by the petitioners and summarily rejected by the trial court. From that point the matter proceeded exclusively on state grounds and was accordingly decided on the basis of state law by the New Hampshire Supreme Court.

When the petitioners elected to pursue their claims exclusively on state grounds and were disappointed in the result they should not be permitted to shift to federal grounds based solely on the flimsy reference to constitutional provisions in the original Superior Court petition. Wright, Miller, Cooper and Gressman, *Federal Practice and Procedure, Jurisdiction* § 4022, p. 697, n.6.

Petitioners' reliance on *Maryland v. Garrison*, 480 U.S. 79 (1987) for the proposition that jurisdiction in this Court is reserved when the state court decision rests on state constitutional provisions similar to the Federal Constitution is misplaced (Petition for Writ of Certiorari, p. 10). In the *Maryland* case the state court decided the issue in question on both state and federal grounds and the Court accepted jurisdiction because the State Constitution was interpreted *in pari materia* with the Federal Constitution. *Id.* at 83. In the present case the New Hampshire Supreme Court interpreted the New Hampshire Constitution without connection or reference to the Federal Constitution and decided the case exclusively on state grounds (Petition for Writ of Certiorari, Appendix D). This is probably in large part due to the fact that the petitioners completely ignored federal questions in their presentation to the New Hampshire Supreme Court.

It is well settled that this Court will decline to review the judgment of a state court that rests entirely on independent and adequate state grounds. *Herb v. Pitcairn*, 324 U.S. 117, 65 S. Ct. 459, 89 L. Ed. 789 (1954); 12 *Moore's Federal Practice*, § 511.01, pp. 865-66.

III.

THE CASE WAS PROPERLY DECIDED BY THE NEW HAMPSHIRE SUPREME COURT.

The New Hampshire Supreme Court decision in this case was based on the longstanding and unanimously accepted doctrine that the use of a municipal sewer system is a license and not a property right, and on the facts of the case was fair and just.

It has been accepted, without exception, by every court that has considered the question that connection to a municipal sewer system is not a property right, but a revocable license. E.

McQuillin, *The Law of Municipal Corporations*, § 31.31, at 289 (3d ed. 1991); *Baker v. Princeton*, 226 Ky. 409, 411, 11 S.W. 2d 94, 95 (1928); *Blue Fox Bar v. City of Yankton*, 424 N.W. 2d 915, 919 (S.D. 1988); *Village of Menomonee Falls v. Michaelson*, 104 Wis. 2d 137, 311 N.W. 2d 658 (1981); *Russell v. City of Pacific Grove*, 54 Cal. App. 3d 53, 126 Cal. Rptr. 371 (1975); *LaSalle National Bank & Trust Co. v. City of Chicago*, 128 Ill. App. 3d 656, 470 N.E. 2d 1239 (1984); *Erickson v. City of Sioux Falls*, 14 N.W. 2d 89 (Sup. Ct. S.D. 1944); *Camp v. Barre*, 66 Vt. 563 (1984); *Satrom v. City of Grand Forks*, 163 N.W. 2d 522 (Sup. Ct. N.D. 1968).

In this case the New Hampshire Supreme Court was unanimous in its decisions to uphold this well settled and uniformly accepted principle that connection to a municipal sewer system is a revocable license and not a property right.

Finally, petitioners' assertions to the contrary notwithstanding (*see* Petition for Writ of Certiorari, p. 28) the decision in this case is fair and equitable. Since 1932 the petitioners' properties benefited from their connection to the sewer pipe which unabashedly poured raw effluent into the Connecticut River. At the same time, all other properties in the Town bore the expense and effort of disposing of sewage through their own individual septic systems. It is not unfair or unjust to now require those properties which benefited over the years from the polluting sewer system to now do what every other property in Town is required to do and bear the expense of installing their own septic systems to alleviate the problem. This is especially true when the cost of installing an individual system is around $2,500 payable by the property owner that will benefit from the system and the alternative is a municipal treatment system that will cost over a million dollars payable by all taxpayers, most of whom will receive no benefit at all from the system.

A reversal of the New Hampshire Supreme Court decision in this matter will have the effect of requiring the vast majority of Monroe taxpayers not only to pay for their own septic systems, but also to pay for the septic systems of the favored few Village property owners. Not only would this result be unfair, but it would be contrary to the opinions of virtually every court that has considered the issue.

There is no doubt that the New Hampshire Supreme Court decision is well grounded in unanimously accepted principles of state property law and is fair and just under the circumstances. For these reasons the United States Supreme Court should not accept jurisdiction of this matter.

IV.

THE PETITION FOR WRIT OF CERTIORARI CONTAINS NUMEROUS MISSTATEMENTS OF FACT.

Pursuant to Supreme Court Rule 10, set forth below are references to a number of misstatements of fact found in the Petition for Writ of Certiorari which are relevant to the issues at hand and sets forth corrections of the misstatements that conform to the record of these proceedings and the presently existing state of affairs in the Town of Monroe.

On page 8 of the Petition it is stated that the Town sewer presently serves 45 single family residences and various other buildings. This is not true. When the Petition was filed on February 3, 1992 there were only nineteen properties left connected to the sewer and twelve have received state approval to install individual systems, and some of the forty-five have withdrawn as plaintiffs from this lawsuit (*see* Petition for Writ of Certiorari, p. 2). Most of the properties mentioned were disconnected from the sewer over a year ago. This fact is well known to the petitioners and

their attorneys and it is astonishing that this important matter is so blatantly misstated.

On page 20 it is stated that there was a "mutual" understanding that the Town would permanently maintain the sewer system and that the Town refused to allow installation of on-site systems. This is not true. At no time did the Town ever agree to permanently maintain or improve the sewer system. It is also implied on page 20 that the Town voted to improve the sewer system. This is misleading. Since 1978 when the state and federal governments put the Town on notice that pollution of the Connecticut River would no longer be tolerated, the Town was undecided about how to solve the problem. The only dispositive action was taken by Town vote in 1989 when it was decided that a municipal treatment system would not be installed and Village properties would be required to install their own septic systems to conform with the rest of the properties in the Town.

On page 23 it is stated that there are a number of lots in the Village that will have no means of disposing of sewage and will become uninhabitable. This is not true. A septic system has been designed for every affected property. The New Hampshire Supreme Court addressed this issue and was persuaded that the Town's willingness to accommodate the three properties with insufficient room to locate septic systems alleviated the problem (New Hampshire Supreme Court Opinion, Petition for Writ of Certiorari, Appendix D, pp. 69-70). Since that time the state has approved septic designs for the minimally sized lots.

On page 23 it is stated that disconnection of the sewer will affect the school, medical clinic, bank and Town offices. This is not true. Each of these properties had a septic system installed over two years ago and presently experience no problems related to sewage disposal. These facts are well known to petitioners and it is astonishing that they would assert otherwise.

On page 24 it is stated that if the sewer is discontinued, property owners will be burdened with large costs and required to leave their homes. This is not true. As set forth above, the average cost for installing individual septic systems is approximately $2,500 and as observed by the New Hampshire Supreme Court, the Town will cooperate with installing systems on the smaller properties so no one will be required to leave their homes. It is also important to note that the smaller properties all have state approved septic system designs.

On page 25 it is stated that the law requires plaintiffs to connect to the sewage system. This is not true. The petitioners know full well that all the affected properties except nineteen remaining offenders have disconnected from the sewer system and installed individual systems with the approval and encouragement of the local and state governments, and out of the remaining nineteen, twelve have received approval to install individual systems.

On page 26 it is stated the plaintiffs' connections to the Town sewer system created no health hazards or violations and do not give rise to a nuisance. This statement is most likely premised on the petitioners' illogical refusal to understand that it is their raw sewage that is polluting the Connecticut River and that once they are disconnected from the system the problem will be completely abated.

On page 27 it is stated that the Town is abandoning a functional public sewer system. Nothing could be further from the truth. The system presently functions in violation of state and federal law and at considerable peril to the safety and health of the community. To call it functional is foolhardy.

On page 27 it is stated that the users of the system are a discrete and insular minority. This is not true. The system originally

served both public and private properties, commercial properties as well as residences. Geographically, it extended out of the immediate Village area to some outlying properties. There is simply no basis in fact for describing the sewer system users as a discrete insular minority.

On page 28 it is stated that the "minority," defined by the petitioners as users of the system, will pay a high price and be deprived of the use and value of their property. This is not true. As stated above, the cost of installing individual systems is low when compared to the whole value of each individual property and no owner will be deprived of the use of his property as a result of the discontinuance of the sewer.

Presumably, the petitioners have misconstrued these facts in order to paint a picture of a victimized minority being mistreated by a dominant municipal entity. This is simply not the case. It is dismaying that the petitioners would resort to the intentional misrepresentation of important facts to persuade the Court to accept jurisdiction of this matter.

Respondents hereby represent that a review of the record below and examination of the present state of affairs in the Town of Monroe will clearly demonstrate the inaccuracy of the challenged statements.

CONCLUSION

In conclusion, it is respectfully submitted that the petitioners failed to preserve and present the federal questions in the state courts below and the New Hampshire Supreme Court accordingly decided the case fairly and justly on unanimously accepted principles of independent and adequate state law. Moreover, the obvious mischaracterization of material facts by the petitioners makes impossible a fair and impartial review of the issues herein presented. For these reasons respondents respectfully urge the Court to deny this Petition for Writ of Certiorari.

Respectfully submitted

EDWARD M. VAN DORN, JR.
Attorney for Respondents

Dated: February 28, 1992

APPENDIX A — MOTION TO AMEND PETITION

STATE OF NEW HAMPSHIRE

SUPERIOR COURT

GRAFTON, ss. DOCKET NO. 88-E-107

RAYMOND ADAMS, ET AL

V.

TOWN OF MONROE, ET AL

MOTION TO AMEND PLAINTIFFS' PETITION

The Plaintiffs move as follows.

That the pending Petition be amended by the addition of the following paragraphs subsequent to paragraph 20 under Count I, relating to the actions of Bernard Bradshaw, Leslie Morrison and Robert M. Wormer.

21. A petition to establish a village district pursuant to RSA Chapter 52, dated April 11, 1989, for the purpose of the construction, operation and maintenance of sewage and waste treatment plant was filed with the Selectmen, together with a proposed district as shown on an exhibit attached to the petition. The proposed district excluded the Plains Road section of the Village. Prior to the filing of the petition, the persons responsible for the petition had checked with landowners on Plains Road and determined that such landowners were not interested in being connected to a sewer system in the event a village district was established for that purpose. The Selectmen were informed of the position of landowners on the Plains Road at the time of

the delivery of the petition. The Selectmen stated that they intended to contact the landowners on Plains Road before establishing the boundaries of the proposed district. The Selectmen did not contact any of the landowners on Plains Road, yet changed the boundaries of the proposed district attached to the petition of April 11, 1989, and included Plains Road. A public hearing was held on the petition as required by law on May 17, 1989. Those persons present and voting residing in the proposed district voted against establishing the district. The proponents voted against the district because of the inclusion of the Plains Road.

22. Directly after the public meeting on May 17, 1989, on the first petition to establish a village district, a second petition was delivered to the Selectmen and received on May 18, 1989. The boundaries of the proposed district excluded the Plains Road area.

23. The legal responsibility of the Selectmen upon receiving a petition to establish a village district pursuant to RSA Chapter 52 is to review the boundaries and to fairly and honestly fix the limits of the proposed district. *Attorney-General v. Littlefield,* 78 NH 185 (1916). The only question before the Selectmen upon receipt of such a petition is what boundaries of the proposed district would best promote the public interest of the village. It is not the business of the Selectmen to consider whether or not there are sufficient reasons of public policy to establish a village district as that question is for decision of the voters living within the boundaries of the proposed district.

24. Notwithstanding the clear legal obligation of the Selectmen to call a second public meeting to consider the second petition, the Board of Selectmen acting unfairly, with prejudice and a gross abuse of their discretion and judgment, determined

that they would not draw the boundaries of the proposed district as suggested by the petitioners by the exclusion of Plains Road regardless of whether or not landowners on Plains Road wished to be included in the proposed district. Minutes of Selectmen's meeting of June 6, 1989, stated:

> "The boundaries were set the same because in the opinion of the Board of Selectmen all properties presently served by the existing system should be included in any precinct formed for the purpose of sewage disposal."

The Selectmen's determination of the boundaries of the proposed district formed for the purpose of resolving the matter of sewage disposal was not acted upon for the purpose of best promoting the public interests of the village.

25. The properties required to be included on the Plains Road by the Selectmen in any proposed village district have ample area for the installation of on-site systems. The inclusion of these properties which would require the installation of a new sewer line to serve Plains Road in any new sewage disposal system would place an unreasonable and unnecessary burden on any village district formed for that purpose.

WHEREFORE, the Plaintiffs' move:

A. That the Court allow the amendment by the addition of paragraphs 21-25 to Count II to cover additional claims that have arisen since the filing of the Plaintiffs' Petition.

Dated this 15th day of August, 1989.

Appendix A

Respectfully submitted,

RAYMOND ADAMS, ET AL
By their attorney,

s/ Laurence F. Gardner, Esq.
LAURENCE F. GARDNER
78 Bank Street
Lebanon, NH 03766
(603) 448-2221

Certificate

I hereby certify that a copy of the within Motion to Amend Plaintiffs' Petition has been mailed via first class mail this 15th day of August, 1989, to Kevin R. Bruno, Esq., PO Box 109, Woodsville, NH 03785.

s/ Laurence F. Gardner, Esq.
LAURENCE F. GARDNER

LFG:jw
AUG89/8-15monroe

APPENDIX B — MOTION FOR CLARIFICATION OF RIGHTS

STATE OF NEW HAMPSHIRE

SUPERIOR COURT

GRAFTON, ss. DOCKET NO. 88-E-107

RAYMOND ADAMS, ET AL

V.

TOWN OF MONROE, ET AL

The Plaintiffs, through their attorney, Laurence F. Gardner, move as follows:

1. This lawsuit is an action for declaratory relief and a bill in equity. The Plaintiffs seek, among other relief, a declaration that certain expenditures of Town funds and certain actions at the 1988 Town meeting were illegal and an Order preventing the Town Selectmen from discontinuing the sewer line which currently serves Plaintiffs' properties. The current action is a case in equity.

2. If the Court does not enjoin the discontinuance of the sewer line and if it is thereafter discontinued by the Town, many of the Plaintiffs will suffer substantial damages. Specifically, many of the properties will require unsightly raised septic systems and will, therefore, be greatly reduced in value. Several of the properties cannot support on-site sewage disposal systems of any kind and would therefore be rendered of little or no value if the sewer line is discontinued. In addition, there may be claims for nuisance and damages.

Appendix B

3. At the present time, Plaintiffs have no right to assert a claim for damages that may occur as a result of actions which may be taken by the Defendants in the future to discontinue the the sewer line.

WHEREFORE, The Plaintiffs respectfully request that the Court:

a. Confirm that the Plaintiffs have no present right to assert a claim for damages which may result if the Defendants discontinue the sewer line at some time in the future.

b. Grant such other and further relief as is just and equitable.

DATED this 27 day of September, 1989.

Respectfully submitted

RAYMOND ADAMS, ET AL

By their attorney

s/ Laurence F. Gardner
LAURENCE F. GARDNER
PO Box 2009
78 Bank Street
Lebanon, NH 03766
(603) 448-2221

Certificate

I hereby certify that a copy of the forgoing Motion has been mailed via first class mail, postage prepaid on this 27 day of

Appendix B

September to Kevin Bruno, Esq., and Edward M. Van Dorn Esq., counsel of record.

s/ Laurence F. Gardner
LAURENCE F. GARDNER

APPENDIX C — RULINGS OF LAW

79. WSPCD would have allowed the Town sufficient time to design, install and construct a wastewater treatment system in the Consent Decree signed by the Town if the Town has so voted to construct such a community system. Testimony of Mr. Carter, Day 3, Cross-examination.

DENIED

80. The Town Meeting, under Article 6 on February 10, 1989, voted to construct individual on-site septic systems to serve Town buildings. Defendants' Exhibit F.

GRANTED

81. There was no article or action taken under any article to appropriate money for the construction of on-site systems to serve Town buildings at the Town Meeting on February 10, 1989, or the Town Meeting on March 8, 1988. Defendants' Exhibit F, Town Meeting Minutes for February 10, 1989; Defendants' Exhibit E, Town Meeting Minutes for March, 1988 Town Meeting.

GRANTED

82. The Defendant Selectmen were without Town Meeting authority to spend money in 1989 to construct and install on-site septic systems for Town buildings. Defendants' Exhibit F, Town Meeting Minutes for February 10, 1989; Defendants' Exhibit E, Town Meeting Minutes for March, 1988 Town Meeting.

DENIED

83. The Selectmen were without authority to request, and the Trustees of Trust Funds were without authority to pay, and funds withdrawn from the Capital Reserve Fund to pay for the construction and installation of on-site septic systems to serve Town buildings in 1989. Defendants' Exhibit F, Town Meeting Minutes for February 10, 1989; Defendants' Exhibit E, Town

Appendix C

Meeting Minutes for March, 1988 Town Meeting.

DENIED

84. The Town is without justification in the abandonment of the Town sewer.

DENIED

II. Rulings of Law

3. The Town of Monroe breached its duty by failing to take action to resolve the problem of the dumping into the Connecticut River. *Mitchell v. Dover,* 98 NH 285 (1953), *Central National Insurance Company v. City of Kansas City, Missouri,* 546 F.SUPP, 1237, (1982).

DENIED

4. There is no justification for the abandonment of the Town sewer system. *Schanck v. Town of Hephzibah,* 224 S.E. 2d 354 (1976) (Georgia).

DENIED

5. The Town Meeting action of February 10, 1989, abandoning the Town sewer system leaves dependent lot owners worse off than if the Town had not provided such service and, therefore, cannot discontinue or abandon the Town sewer system. *Young v. City of Scriber,* 106 N.W. 2d 864 (1960) (Nebraska).

DENIED

6. The essential purpose of the guaranteed protection in the State Constitution in Part I, articles 2 and 12, is to protect the minority from the actions of the majority and to nullify those actions where the majority action is arbitrary and unreasonable. *Grondin v. Town of Hinsdale,* 122 NH 882 (1982).

DENIED

Appendix C

7. The Town Meeting action of February 10, 1989, abandoning the Town sewer system constitutes an exercise of the police power which is limited by the State Constitution, Part I, article 2 and article 12; *State v. Ramseyer*, 73 NH 31 (1904); *Woolf v. Fuller*, 87 NH 64 (1934); *Burrows v. City of Keene*, 121 NH 590 (1981).

DENIED

8. The constitutional validity of the action of the Town Meeting of February 10, 1989, abandoning the Town sewer system is subject to the test that the public benefit must outweigh the private burden and that the means are reasonably necessary for the accomplishment of the public purpose and not unduly oppressive on individual landowners. *State v. Ramseyer*, 73 NH 31 (1904).

GRANTED

9. The constitutional test involves a balancing of the public benefit and the private harm. *Town of Chesterfield v. Brooks*, 126 NH 64 (1985).

GRANTED

10. The exercise of the police power by the Town Meeting of February 10, 1989, is arbitrary and unreasonable and is ruled invalid as violating the New Hampshire State Constitution, Part I, article 2 and article 12. *Grondin v. Town of Hinsdale*, 122 NH 882 (1982); *Metzger v. Town of Brentwood*, 117 NH 497 (1977).

DENIED

11. Our Supreme Court has struck down again and again attempts by legislative bodies by majority vote to impose unconstitutional restrictions on the rights of private property. *State v. Ramseyer*, 73 NH 31 (1904); *Burrows v. City of Keene*, 121

Appendix C

NH 590 (1981); *Grondin v. Town of Hinsdale,* 122 NH 882 (1982).
GRANTED

12. The Plaintiffs have shown that the Town Meeting action of February 10, 1989, causes great harm to private property while the public benefit is slight.

DENIED

13. The Plaintiffs have satisfied the burden of proof and the Court rules that the Town Meeting action of February 10, 1989, abandoning the Town sewer system violates the New Hampshire Constitution, Part I, articles 2 and 12.
NOT RULED UPON (SEE ORDER OF 3/13/90)

14. The Town is ordered to cease and desist from disconnecting any buildings in the village from the Town sewer system.

DENIED

15. The Town is ordered to proceed expeditiously to take action to provide a wastewater treatment plant for the Town sewer.
DENIED

16. The Judgment Order in Docket No. 82-E-077 shall be revised as a result of this Order after appropriate pleadings and hearing.

DENIED

17. The pattern of conduct by the Selectmen establishes that the Selectmen did not act in good faith but were actuated by partiality and predisposition. *Attorney General v. Littlefield,* 78 NH 185 (1916); *Funtown v. Town of Conway,* 127 NH 312 (1985).
DENIED

Appendix C

18. The Defendant Selectmen failed to act impartially in the discharge and performance of their duties and acted in bad faith. *New Hampshire Constitution*, Part II, Article 84.

DENIED

Dated this 20th day of November, 1989.

Respectfully submitted
Raymond Adams, et al
By their attorney,

s/ Laurence F. Gardner
Laurence F. Gardner, Esq.
PO Box 2009, 78 Bank Street
Lebanon, NH 03766
(603) 448-2221

APPENDIX D — DESCRIPTION OF CASE

The Town of Monroe, through its Town Meeting, voted to discontinue an entire sewer system, the only one in Town, that serves the compact portion of the Town referred to as the village. The number of voters outside the village far outnumber the voters in the village. Monroe is one of the fortunate New Hampshire towns where about 75% of the taxes are paid by public utilities. The minority attempted in every way to have the Town follow the responsible course of constructing a wastewater treatment plant to solve the problem of discharging untreated sewage into the Connecticut River. Instead, the Defendants, the Selectmen, took the initiative and pressed for abandoning the Town Sewer System in operation for more than 50 years and forcing the problem of disposing of sewage onto the properties in the village at their expense.

Following the lead of the Selectmen, on February 10, 1989, the Town Meeting rejected all alternative solutions and voted the abandonment of the Town Sewer System.

The Plaintiffs, property owners in the village, filed a Petition for Declaratory Relief and Bill in Equity to stop the abandonment of the entire sewer system and to require the Town to construct a wastewater treatment plant. The Plaintiffs challenged both the authority of the abandonment and the constitutional validity of the decision to abandon.

The Trial Court denied the requested relief, but ruled that the action of the Town Meeting had the effect of taking away from the Plaintiffs part of their property rights. This taking requires the Town to pay compensation to the property owners. The amount of the compensation to be determined subsequently.

Appendix D

STATUTE, ORDINANCE, REGULATION, RULE, OR OTHER LEGAL AUTHORITY UPON WHICH THE CLAIM OF CIVIL OR CRIMINAL LIABILITY WAS BASED:

New Hampshire Constitution, Part I, articles 2 and 12; Part II, article 84; RSA 149-I:1.

SPECIFIC QUESTIONS TO BE RAISED ON APPEAL, EXPRESSED IN TERMS AND CIRCUMSTANCES OF THE CASE, BUT WITHOUT UNNECESSARY DETAIL. ***SEE RULE 7(7).*** **STATE EACH QUESTION IN A** ***SEPARATELY NUMBERED PARAGRAPH. SEE*** **RULE 16(3)(b).**

1. Did the Trial Court commit an error of law in ruling that the authority of RSA 149-I:1 to construct and install a sewer system included the authority to abandon the entire sewer system and, therefore, the Town was legally authorized to abandon the Town's sewer system in the village of Monroe?

2. Did the Trial Court commit an error of law in ruling that the exercise of the police power by the Town Meeting of February 10, 1989, was not arbitrary or unreasonable and did not violate the New Hampshire State Constitution, Part I, article 2 and article 12?

3. Did the Trial Court commit an error of law in ruling that the Selectmen have the authority to expend funds from the Monroe Village Sewer Capital Reserve Fund for the construction and installation of septic systems to service Town Buildings where there had never been any Article to appropriate money for that purpose?

4. Did the Trial Court commit an error of law in denying the

Appendix D

Plaintiffs' Motion to Amend dated August 15, 1989, which sought to add allegations of fact relating to their claim of bad faith against the Defendant Selectmen arising from conduct of the Selectmen subsequent to the initial Petition, on the same subject matter?

5. Did the Trial Court commit an error of law in ruling that the pattern of conduct by the Selectmen did not establish that the Selectmen were not acting in good faith but were actuated by partiality and predisposition as such ruling was contrary to the testimony of Mr. Dana, Mr. Morrison and Mr. Bradshaw?

6. Did the Trial Court commit an error of law in ruling that the Town was not obligated to continue the Town sewer system because the abandonment of that sewer system would leave dependent lot owners worse off than if the Town had not provided such service?

7. Did the Trial Court commit an error of law in ruling that the Town did not have any duty to anticipate the need for a wastewater treatment plant to treat sewage dumped into the Connecticut River?

APPENDIX E — TABLE OF AUTHORITIES AND QUESTIONS PRESENTED FOR REVIEW

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Appendix E

QUESTIONS PRESENTED FOR REVIEW

I. Did the trial court commit an error of law in ruling that the authority of RSA 149-I:1 to construct and install a sewer system included the authority to abandon the entire sewer system and, therefore, the Town was legally authorized to abandon the Town's sewer system in the village of Monroe?

II. Did the trial court commit an error of law in ruling that the exercise of the police power by the Town Meeting of February 10, 1989, was not arbitrary or unreasonable and did not violate the New Hampshire State Constitution, part I, article 2 and article 12?

III. Did the trial court commit an error of law in ruling that the Selectmen have the authority to expend funds from the Monroe Village Sewer Capital Reserve Fund for the construction and installation of septic systems to service Town Buildings where there had never been any Article to appropriate money for that purpose?

The Plaintiffs waive any appeal on questions 4, 5, 6, and 7, as set forth in the Notice of Cross-Appeal, page 4.

APPENDIX F — ISSUES OF LAW

15. In May 1987, the Defendants, the Selectmen, requested the Water Supply & Pollution Control Division to do a subsurface disposal system feasibility study, that is to terminate the Town's sewer and require the Plaintiffs and others to install individual septic system. THE WSPCD Feasibility Report was delivered in August 1987. Plaintiffs' Petition for Declaratory Judgment, paragraph 8; Defendants' Answer to Petition, paragraph 8.

16. On September 14, 1987, WSPCD informed the Defendants that the Town could not meet the July 1, 1988 deadline to terminate discharging untreated sewage into the Connecticut River by any other means except subsurface, as there was not sufficient time to design and construct a sewage treatment facility. Plaintiffs' Petition for Declaratory Judgment, paragraph 8; Defendants' Answer Petitioner, paragraph 8.

III. SUMMARY OF FACTS

The village area in the Town of Monroe consists of approximately 45 single-family homes, the Town Hall, the Town Library, the Town Fire Station, the local store, Monroe School, the Town Clinic Building, a bank, a hairdresser, and a small apartment house. There is a sewer line which collects wastewater from these buildings and discharges untreated wastewater through three pipes or outfalls to the Connecticut River. The present discharge is in violation of Federal and State law. The Town has entered into a consent decree with the State of New Hampshire establishing certain deadlines for the elimination of the illegal discharge. *State v. Monroe,* Docket No. 89-E-077.

On February 10, 1989, at a Special Town Meeting, the voters rejected the construction of any type of wastewater treatment plant and, instead, voted to abandon the Town sewer and authorized

the Selectmen to issue cease and desist orders to the current users of the system. In addition, the voters voted to construct individual subsurface disposal systems for the Town-owned buildings which included the Town Hall, the clinic, the fire station, and the public library.

IV. ISSUES OF LAW

The Plaintiffs submit that the following issues of law are presented to the Court for ruling:

1. Did the Special Town Meeting of Monroe on February 10, 1989, have the authority to abandon the Town sewer system?

2. If the Special Town Meeting of February 10, 1989, had the authority to abandon the Town sewer system, was that Town Meeting action illegal because it violated the State Constitution, Part I, Article II and Article XII?

3. Did the Town have authority to expend money from the Capital Reserve Fund for engineering fees in 1987, 1988 and 1989?

4. Did the Town appropriate money on February 10, 1989, to pay for the cost of constructing individual subsurface disposal systems for the Town-owned buildings?

5. Did the Town of Monroe appropriate money on March 8, 1988, to pay for the cost of constructing individual subsurface disposal systems for the Town-owned buildings?

6. Did the Selectmen act in bad faith in pursuing the termination of the Town sewer system and forcing property owners in the village to install individual septic systems?

Appendix F

V. STATEMENT OF THE PLAINTIFFS' POSITION

1. The legislative body of the Town of Monroe, namely the Town Meeting, does not have the authority under New Hampshire law to abandon the Town sewer system. There is statutory authority to construct and install a sewer system but no authority to abandon the entire system.

2. The legislative body of the Town of Monroe cannot take action to abandon the entire Town sewer system located in the village under the circumstances present in this case, because such action violates the State Constitution, Part I, Article II and Article XII.

3. After the construction and installation of the Town sewer system in 1932 together with an extension and the addition of municipal buildings after 1932, the Town cannot walk away from the Town sewer system. The Town chose to accept the duty to repair and maintain the Town sewer system which included the obligation to foresee the necessity of improvements to the Town sewer system to come into compliance with Federal and State law with regard to discharging sewage into the Connecticut River. The Town has the duty to continue the Town sewer system. There is no legal authority to allow the Town to abandon the Town sewer system. The Town cannot shift its public obligation to make improvements to the Town sewer system to comply with Federal and State law

* * *